

A Perwira Affin Bank Bhd v Tan Ah Tong

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR EXECUTION
NO 38-117 OF 1989 (CODE NO S5-24(31)-1641 OF 1987)
KAMALANATHAN RATNAM J
6 SEPTEMBER 2000

B *Civil Procedure* — *Injunction* — *Injunction to restrain public auction* — *Public auction fixed by court* — *Whether High Court can grant injunction to set aside its own earlier order*

C The defendant applied for an interim injunction to stop the sale of land by public auction fixed pursuant to an order of court. Counsel for the plaintiff argued that the court ought not to grant an injunction to restrain its own earlier order for sale.

Held, dismissing the application with costs:

D One High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. An exception to this rule is where the final judgment of the High Court could be proved to be null and void on grounds of illegality or lack of jurisdiction. In the present case, the defendant had failed to establish this exception (see p 11G-H).

E **[Bahasa Malaysia summary]**

F Defendan memohon injunksi interim untuk menghalang jualan tanah melalui lelong awam yang ditetapkan mengikut perintah mahkamah. Peguam plaintif berhujah bahawa mahkamah tidak harus menunaikan injunksi untuk menahan perintah jualannya yang lebih awal.

G **Diputuskan**, permohonan ditolak dengan kos:
Satu Mahkamah Tinggi tidak boleh mengetepikan satu perintah muktamad yang diperolehi secara biasa daripada satu lagi Mahkamah Tinggi yang sejajar bidang kuasanya. Pengecualian kepada peraturan ini ialah di mana penghakiman muktamad Mahkamah Tinggi tersebut dapat dibuktikan batal dan tidak sah atas alasan salah di sisi undang-undang atau tiada bidang kuasa. Dalam kes ini, defendan gagal membuktikan pengecualian ini (lihat ms 11G-H).]

H **Notes**

For cases on injunction generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1927-2353.

I **Cases referred to**

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd
[1998] 1 MLJ 393

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533
Oversea-Chinese Banking Corp Ltd v Realty Sdn Bhd & other applications [1989] 1 MLJ 377
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581

A

YN Ngeow (*Loke & Associates*) for all appellants/defendants.
Leong Wai Hong (*Skrine*) for the respondent/plaintiff.
Elaine Yap (*Skrine*) for the respondent/plaintiff

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Kamalanathan Ratnam J:

The application

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This is an application by the defendant for an interim injunction to stop the sale by public auction of land held under HS (D) 16193–16225 for Lot Nos 4235–4267 and HS (D) 16226 for Lot No 4268 which was to be held on 3 July 2000 pursuant to an order of court dated 26 May 2000. At the commencement of the hearing of the application, counsel for the respondent/plaintiff raised two preliminary objections having given earlier notice of same to the applicant/defendant who indicated that he was ready to respond.

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Findings of the court

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As the first preliminary objection, Mr Leong for the respondent argued that this court ought not to grant an injunction to restrain its own order for sale. It was pointed out that the initial order for sale was made on 5 September 1998 and that since there were no bidders, there were numerous attempts at sale culminating in the last order of this court made on 26 May 2000 fixing the auction date to 3 July 2000. In *Oversea-Chinese Banking Corp Ltd v Realty Sdn Bhd & other applications* [1989] 1 MLJ 377, Abu Mansor J (as his Lordship then was) when considering a case on almost similar issues held at p 381 as follows:

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The injunction to my mind cannot also be granted for another very good reason. I agree with the submission of counsel for the chargee that there is no jurisdiction of this court to restrain the order of another high court of co-ordinate jurisdiction (see *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533).

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His Lordship went on further to hold in the next paragraph as follows:

Even if the court could give the order to restrain, the court concludes that this matter is res judicata in the broad sense as the matters raised could have been raised in the foreclosure proceedings. I find the authority in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 binding on this court where it was held that matters which could have been raised earlier should have been raised in the earlier proceeding and to raise them again here is an abuse of the process of the court.

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In respect of the issue of res judicata, Mr Ngeow for the appellant argued that the order for sale made on 26 May 2000 was made in respect of a

- A property whose title is no longer in existence because the said original title had already been surrendered to the Land Office for sub-division purposes. He referred me to the original order for sale which referred to the original title held under Grant No 7188 for Lot No 94 Mukim of Ulu Kelang, Negeri Selangor (the original title), as being the subject matter of the order for sale. Even the proclamation of sale to be held on 25 November 1988
- B referred to the original title although the lot numbers referred to in the latest order for sale were also referred to in the first proclamation of sale to be held on 25 November 1988. It was the contention of Mr Ngeow that since there has been no entry anywhere so far that the main title had been sub-divided into the 34 sub-titles, which are the subject matters of the later
- C order for sale, there was therefore no question of res judicata applying in this case.

- D It is surprising that counsel can take such a stand when the defendant himself had affirmed an affidavit (encl 15) where he admitted in para 4 to that fact. Further the proclamation of sale to be held on 23 February 2000 clearly stated that the original title No 7188 Lot No 94 had been sub-divided and the present sub-divided lots with their titles have been individually stated. There is no question of the defendant not knowing of the sub-division and there is clear reference on record of the new and the old titles. To nail the case against the defendant, the plaintiff referred me to an order of this court dated 21 December 1999 where, inter alia, the said
- E order reads as follows:

- F ... ADALAH DIPERINTAHKAN bahawa penjualan keseluruhan tanah melalui lelongan awam yang dipegang di bawah HS(D) 16193-16225 untuk Lot 4235-4267 dan HS(D) 16226 untuk PT 2324 Lot 4268 (dahulunya dikenali sebagai Geran No 7188 untuk Lot No 94, Mukim Ulu Kelang, Negeri Selangor ('tanah tersebut') ditetapkan pada 23 Februari 2000 jam 9.30 pagi di bilik lelong Mahkamah Tinggi Kuala Lumpur ...

- G To my question as to whether the plaintiff had appealed against that decision, Mr Ngeow confirmed that his client had not done so. In the circumstances, I am constrained to hold that both the preliminary objections raised by the plaintiff are founded on solid principles. Mr Ngeow referred me to *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and urged me to follow the guideline set by the Federal Court that whilst it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, the one special exception to this rule is where the
- H final judgment of the High Court could be proved to be null and void on grounds of illegality or lack of jurisdiction. Unfortunately, Mr Ngeow had failed to establish this exception. On the contrary he has fallen into the same error which the Federal Court was quick to point out, happened to the court below in *Badiaddin*, when the said court failed to appreciate the central argument on the availability of the inherent jurisdiction of the High Court
- I to exercise its discretion to set aside what was obviously an illegal attempt by the respondent to subvert and to effectively reverse the original final and perfectly legitimate order as a special exception to the doctrine governing

the finality of court orders notwithstanding the absence of any appeal. I therefore dismissed the application with costs. A

Application dismissed with costs.

Reported by Anitha MI Raman

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